Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MAURIZIO PERCAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit err in holding that defendant Maurizio Percan's convictions of money laundering and money laundering conspiracy under 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(h) and 1957(a) should not be grouped with his convictions of interstate transportation of stolen property pursuant to U.S.S.G. § 3D1.2 for purposes of calculating his total offense level?

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The decision of the Court of Appeals, dated May 3, 2001, is reported at *United States v. Kalust*, 249 F.3d 106 (2d Cir. 2001). (Appendix A).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Second Circuit was entered on May 3, 2001. This Court has jurisdiction to grant *certiorari* pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

U.S.S.G. § 3D1.2:

§ 3D1.2. Groups of Closely-Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic

in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

18 U.S.C. § 1956(a)(1):

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [26 USCS § 7201 or 7206]; or

(B) knowing that the transaction is designed in whole or in part —

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(h):

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1957(a):

§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity
(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

STATEMENT OF FACTS

Petitioner Maurizio Percan ("Petitioner") was charged in a multi-count indictment with conspiracy under 18 U.S.C. § 371, interstate transportation of stolen property under 18 U.S.C. § 2341, money laundering under 18 U.S.C. § 1956(a)(1)(A)(i) and 1957, and money laundering

conspiracy under 18 U.S.C. § 1956(h). (23a). The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

The essence of the charges in the indictment was that petitioner, who was the principal of an automobile repair shop in the Bronx doing business under the name of All in One, conspired with others to steal air bags from motor vehicles. (3a). The stolen air bags would then be shipped under the auspices of All in One to buyers throughout the country. (3a). The method by which the conspiracy was carried out was that street-level thieves would steal the air bags pursuant to purchase orders issued by petitioner and would then bring the stolen parts to him and receive payment. (3a). In all cases, petitioner would pay the thieves by check. (13a). The shipment of the air bags to the buyers was conducted by employees of All in One including Eileen Kalust. (3a).

The money laundering charges were brought under 18 U.S.C. § 1956(a)(1)(A)(i) in that petitioner was charged with reinvesting the proceeds of air bag sales into the purchase of other air bags. (13a). Petitioner was not charged with attempting to conceal either his criminal activity or the origin of the proceeds thereof. Indeed, because all payments were made by check and all proceeds were deposited into All in One's bank account, petitioner's financial transactions had exactly the opposite effect. Far from concealing his activities, the deposits and payments left a readily traceable paper trail at such time as his activities came under investigation.

Prior to trial, several of the street-level thieves, as well as Kalust, entered pleas of guilty and cooperated with the

government. After a jury trial, petitioner was convicted on all charges against him. (3a). A presentence investigation report ("PSI") was duly prepared and sentencing was scheduled.

The final PSI calculated petitioner's total offense level at 30, with the money laundering counts grouped separately from the underlying stolen property and conspiracy offenses. Prior to sentencing, petitioner submitted a memorandum arguing that the counts relating to money laundering should be grouped with the underlying offenses pursuant to U.S.S.G. § 3D1.1(2)(b), which would result in a total offense level of 28 due to the lower number of groups. (4a). The Government argued in favor of the PSI's guideline calculation, citing the Second Circuit's decision in *United States v. Napoli*, 179 F.3d 1 (2d Cir. 1999).

At the time of sentence, petitioner's counsel argued that this case fell into the "wiggle room" created by footnote 3 of *Napoli*, in which the Second Circuit had left open the possibility that "the function of money laundering can sometimes be so highly interwoven into a fraud scheme that the fraud victim is the direct victim of the money laundering as well, and the counts should be grouped together." *Id.* at 8 n.3. Petitioner argued that his money laundering acts, which amounted solely to reinvestment rather than concealment, did not harm any societal interest other than that impacted by the air bag thefts they promoted, and that the victims of both were therefore identical. (4a). However, the district court agreed with the Government's position and sentenced petitioner at an offense level of 30, resulting in a sentence of 108 months' incarceration. (5a).

Petitioner took a timely appeal to the United States Court of Appeals for the Second Circuit, arguing *inter alia* that the sentencing court erred in failing to group the counts relating to money laundering with the underlying counts relating to conspiracy and possession of stolen property under U.S.S.G. § 3D1.2(b). Specifically, petitioner argued that, because his money laundering convictions related to use of money to promote an ongoing criminal offense under 18 U.S.C. § 1956(a)(1)(A)(i) rather than to conceal criminal activity under 18 U.S.C. § 1956(a)(1)(B), the victims of the money laundering offenses were the same as those of the stolen property offenses. Thus, *Napoli* – which had been decided in the context of concealment money laundering – was not controlling. Alternatively, petitioner argued that even under *Napoli*, grouping was still proper because the conduct involved in the money laundering offenses was inextricably intertwined with the conduct constituting the underlying counts.

The appeal was duly argued before the Second Circuit, and on May 3, 2001, it rendered a decision. *See United States v. Kalust*, 249 F.3d 106 (2d Cir. 2001). The two-judge majority disagreed with appellant, finding that the victim of promotion money laundering is society at large rather than the individual victims of the crimes that were promoted. 6a-8a. The majority additionally explained that:

> Permitting grouping in promotion, but not in concealment, cases, as defendant requests, would, incidentally, have the perverse effect of subjecting to sentence enhancements those who launder the proceeds of their criminal conduct and then cease their unlawful activities, while not enhancing the sentences of those, like Percan, who launder the

> proceeds of their criminal conduct in order to use the laundered funds to fuel additional criminal activity.

8a n.4. The court also rejected petitioner's alternative argument that the conduct involved in the money laundering and stolen property offenses was inextricably intertwined, stating that:

> Percan's money laundering activity and his participation in the stolen airbag conspiracy can only be viewed as more interwoven than the money laundering and fraud at issue in *Napoli* insofar as this case involves promotion, and *Napoli* concealment, money laundering. And, as we have already said, that distinction does not undermine the reasoning of *Napoli*. That is, it does not, on its own, make the victims of the two crimes the same for grouping purposes.

9a.

In a separate opinion concurring in the result only, Judge Winter rejected the majority's designation of victim. Adopting petitioner's distinction between concealment and promotion money laundering, he wrote:

> [I]n my view the victim of so-called promotion money-laundering is not society at large, at least on the present facts. To group counts under Subsection 3D1.2(b), the "counts [must] involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme

> or plan." U.S.S.G. § 3D1.2(b) [. . .] Therefore, society is the victim under the Guidelines only by default when no direct victim can be identified.

11a-12a (Winter, J., concurring in the result) (citation omitted). He further argued that:

> Given these criteria, the caselaw that identifies society as the victim of so-called concealment money-laundering makes sense. Concealment laundering follows a crime and by itself has no identifiable victim. Moreover, unpenalized use of a sophisticated and complex system of financial institutions to disguise and transfer funds derived from criminal activity would provide a general incentive to engage in the whole universe of crimes involving monetary gain. It is therefore fair to say that the victim of concealment money-laundering is society at large.
>
> Promotion money-laundering is rather different. The criminal acts here are the use of financial institutions to process the proceeds of prior crimes, to facilitate future crimes... Indeed, "laundering" is a complete misnomer because the future crimes will occur whether the defendant violates the statute by depositing the proceeds in a bank account or avoids the statute's prohibitions by keeping them under a mattress at home. Far from disguising ill-gotten cash, depositing the fruits of a crime in a bank account openly controlled by the defendant, as occurred here, leaves an incriminating paper trail for investigators in the first place they would look.

> One suspects that promotion money-laundering has been made a crime not because it by itself alters the character of the underlying crimes, conceals the proceeds of those crimes (rather, it provides a permanent record of them), or creates incentives to engage in criminal activity generally but because it relieves the government of having to offer extensive proof of underlying crimes.

12a-13a. Thus, he determined that:

> Because promotion money-laundering, by definition, results in identifiable, additional crimes, it usually produces identifiable victims, and did so here, namely, the successive victims of Percan's airbag thefts. My colleagues agree that those from whom airbags were stolen — the victims of at least the interstate transportation of stolen goods counts — are discrete individuals. Therefore, because the fruits of earlier thefts were deposited by Percan in his company's bank account and used to finance the theft of more airbags from later victims, the later, identifiable, victims of the airbag thefts also were victims of the promotion laundering. To be sure, societal interests were harmed every time Percan's conspiracy fed upon its past fruits to add more victims. However, where there is harm to both society and identifiable victims, the Guidelines' Commentary expressly states that the proper victim, for sentencing purposes, is the individual.

13a. However, Judge Winter ultimately disagreed with petitioner's contention that the money laundering counts

should have been grouped under U.S.S.G. § 3D1.2(b). 14a-15a. Instead, he stated that, since the individuals who were victimized by petitioner's money laundering activities could not be precisely identified as those who were victimized by his air bag thefts, the proper grouping rule was the aggregation provision of U.S.S.G. § 3D1.2(d). 15a, 17a. Thus, because grouping under U.S.S.G. § 3D1.2(d) would not affect the total offense level, Judge Winter concurred in the majority's affirmance of petitioner's sentence.

REASONS FOR GRANTING THE WRIT

This is a case that is appropriate – indeed, one that cries out – for review pursuant to Supreme Court Rule 10(a). As the Second Circuit majority acknowledged, this is a case in which "a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter." Specifically, the Second Circuit decision in the instant case followed its earlier decision in *United States v. Napoli*, 179 F.3d 1 (2d Cir. 1999) – a decision which is in direct conflict with the controlling law of five other circuits. Moreover, the conflict between *Napoli* and the Third, Fourth, Fifth, Seventh and Eleventh Circuits is even sharper in the instant case because – as stated by Judge Winter – appellant's money laundering activities have readily identifiable individual victims.

The central issue of this case is whether the money laundering counts should have been grouped with the underlying stolen property counts pursuant to the directive of the Sentencing Guidelines that all offenses resulting in "substantially the same harm" shall be calculated together

in order to avoid imposition of excessive sentences through stacking of counts. *See* U.S.S.G. § 3D1.2. This guideline provides that separate counts "involve substantially the same harm within the meaning of this rule" when, *inter alia*, they "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." U.S.S.G. § 3D1.2(b).

In *Napoli*, the Second Circuit addressed this issue for the first time. The defendant in *Napoli* was convicted under 18 U.S.C. § 1956(a)(1)(B), which prohibits the *concealment* of illegally obtained funds. *See id.* at 3. Specifically, the defendant attempted to conceal the origin of illegally obtained assets by filtering his gains through casino gambling and the accounts of third parties. *See id.* at 5-6. Thus, the Second Circuit held that this conduct implicated societal interests far beyond those implicated by the underlying offense.

Specifically, this type of money laundering "harms society's interest in discovering and deterring criminal conduct, because by laundering the proceeds of crime, the criminal vests that money with the appearance of legitimacy." *Napoli*, 179 F.3d at 8, *citing United States v. O'Kane*, 155 F.3d 969, 972 (8th Cir. 1998). In addition, the *Napoli* court held that this variety of money laundering implicates the societal interest in preventing the subversion of financial institutions as a means of engaging in criminal conduct. *See Napoli*, 179 F.3d at 7-8. Accordingly, the *Napoli* court held that the victim of money laundering was society at large rather than the individuals harmed by the underlying offenses, and that money laundering should not be grouped with these offenses for sentencing purposes. *See id.* at 8. It is on this precedent that the Second Circuit relied in deciding the instant case.

As the *Napoli* court acknowledged, however, other circuit courts were split concerning the issue of whether money laundering should be grouped with underlying offenses. In *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997), for instance, the Fourth Circuit held that fraud and money laundering counts should be grouped where the "[laundered] funds were used to make fictitious interest payments" which were necessary for the continuing fraud. Similarly, in *United States v. Mullens*, 65 F.3d 1160 (11th Cir. 1995), money laundering and fraud counts were grouped where "[l]aundering money by returning false profits to some investors and paying expenses to maintain a facade of success enabled [the defendant] to attract new investors and keep old investors from discovering his deceit." *Mullens*, 65 F.3d at 1164. In light of this, the *Mullens* court determined that "the fraud and the money laundering were integral cogs in continuing the scheme." *Id.*

The Seventh Circuit reached a similar conclusion in *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996). In a case in which the defendant was charged with fraud and concealment money laundering, the court held that:

> The central purpose of this section, as the Eleventh Circuit has pointed out, "is 'to combine offenses involving closely related counts. . .' " and Wilson's convictions for mail fraud and money laundering without question meet that criterion. All of the money that Wilson laundered was money defrauded from his investors, so "without the fraud there would have been no funds to launder. . ." Moreover, the money laundering took place in an effort to conceal the fraud and keep

> the entire scheme afloat. . . In this way, "both the fraud and the money laundering were integral cogs in continuing the scheme."

Id. at 283 (citations omitted). Thus, the Seventh Circuit "reject[ed] the government's contention that these offenses are inappropriate for grouping because they involve different victims and thus different harms," holding that:

> Whether the offenses involve different victims is, as the background commentary notes, "[a] primary consideration" in the grouping decision. There is also a line of authority, on which the district court relied, observing that the victim of mail fraud is the person defrauded, while the victim of money laundering is society at large. . . In the abstract, that may be true. Yet... there is intuitive force to the argument that the victim of the fraud is also a victim of the transaction designed to hide or "cleanse" the funds of which she was defrauded. More to the point, the money laundering in this case served to perpetuate the very scheme that produced the laundered funds.

Id. (citations omitted).

The Third and Fifth Circuits have also held that money laundering may be grouped with the underlying offense under certain circumstances. Significantly, the distinction made by those courts is exactly that urged by appellant in the Second Circuit – namely, the distinction between concealment and promotion money laundering. In *United States v. Cusumano*, 943 F.2d 305, 312-13 (3d Cir. 1991), where the defendant was convicted of theft and bribery from an employee health

fund as well as money laundering, the Third Circuit considered the propriety of grouping the offenses by inquiring whether the money laundering convictions and embezzlement offenses harmed the same victim. It concluded that the victim of the embezzlement offenses, as well as the laundering offenses, was "the fund and its beneficiaries." *Id.* at 313. Thus, the court concluded that these offenses were "part of one overall scheme to obtain money from the fund and convert it to the use of Cusumano," and should therefore be grouped. *Id.*

In *United States v. Leonard*, 61 F.3d 1181 (5th Cir. 1995), the Fifth Circuit followed *Cusumano*. In doing so, it specifically distinguished those cases holding that money laundering harmed society at large:

> because in none of those cases did the money laundering activities of the defendants perpetuate the underlying crimes. Here, however, Greene's money laundering activity, regardless of its limited extent, advanced the mail and wire fraud scheme that victimized nearly 500 people.

Id. at 1186. Thus:

> . . . the money laundering offense was not "ancillary" here. There was a single, integrated scheme to obtain money from the elderly victims and to use that money to facilitate the continuance of the scam. The activities can not be neatly separated. . . By conducting financial transactions-paying callers, purchasing leads, paying phone bills — with the victims' money for the purpose of bilking more people out of $ 395.50 each, the

> group of targeted victims became the victim of the money laundering activity as well as the fraud scheme. In this case, the district court properly found that the money laundering and fraud constituted part of the same continuing common criminal endeavor.

Id. (citations omitted).

Standing against the holding of these cases, and in agreement with *Napoli*, are the First, Eighth and Tenth Circuits. *See United States v. O'Kane*, 155 F.3d 969, 972-73 (8th Cir. 1998); *see also United States v. Kunzman*, 54 F.3d 1522, 1531 (10th Cir. 1995); *United States v. Lombardi*, 5 F.3d 568, 570 (1st Cir. 1993). Thus, the Second Circuit is distinctly in the minority. Moreover, the reasoning of *Lombardi* – which involved concealment money laundering – has subsequently been called into question by the First Circuit. Specifically, in *United States v. LeBlanc*, 24 F.3d 340 (1st Cir. 1994) – which was cited with approval in *Napoli* – the First Circuit noted that Congress passed the Money Laundering Control Act of 1986 in order to add punishment for "conduct that *follows in time the underlying crime* rather than to afford an alternative means of punishing the prior 'specified unlawful activity.' " *LeBlanc*, 24 F.3d at 346 (emphasis added). As noted in *Napoli*, the majority of concealment-type money laundering activity "follows in time the underlying crime." *See Napoli*, 179 F.3d at 8 n.3. In the instant case, in contrast, the money laundering activity at issue – in common with the majority of promotion-type money laundering – was *contemporaneous* with the underlying crime. Thus, it is doubtful whether the First Circuit would follow the Second in declining to group money

laundering counts with underlying offenses where the type of money laundering at issue is promotion rather than concealment.

Moreover, the Second Circuit position is not only a minority position; it is an incorrect position. It should be noted that the Government itself, during the sentencing and appellate proceedings in the instant case, repeatedly emphasized the differences between the concealment and promotion prongs of the money laundering statute. In the context of the grouping rules, the distinction drawn by the Government is indisputably correct. Simply put, the factors that led the *Napoli* court to determine that acts of concealment should not be grouped with the underlying offense are not present in promotion cases.

Petitioner respectfully refers this Court to Judge Winter's concurring opinion below, which emphasizes the difference between the two types of money laundering in the most cogent possible fashion. *See United States v. Kalust*, 249 F.3d 106, 110-11 (2d Cir. 2001) (Winter, J., concurring in the result). Specifically, in offenses involving concealment, the act of money laundering is typically separate from the underlying criminal conduct through which the laundered funds were obtained. This is illustrated not least by *Napoli* itself, in which the means by which the defendant laundered his gains were entirely separate from the fraudulent scheme through which he obtained them. *See Napoli*, 179 F.3d at 4-6. The act of casino gambling through which the funds were made to appear legitimate had nothing to do with the fraudulent sales of cigarettes that formed the underlying criminal conduct. *See id.* The only point at which the casino entered into the defendant's criminal conduct was through its use as a money-laundering device; it was not involved in any way in the cigarette sales.

Where money laundering involves *promotion* of illegal conduct, on the other hand, the laundering is typically *not* independent of the underlying criminal activity. Especially in cases involving reinvestment of illegally obtained funds, the money laundering is simply one of the acts that *constitute* an ongoing criminal scheme. The instant case is a textbook example of this sort of money laundering. Petitioner was accused of taking monies obtained through the sale of stolen air bags and using them to purchase more air bags. None of the money laundering acts of which he was convicted involve any conduct independent of the purchase and sale of stolen air bags. Accordingly, these acts are part and parcel of a single ongoing course of criminal activity rather than independent acts involving parties or institutions not used in perpetrating the underlying offense.

In addition, the social interests harmed by concealment-type money laundering are different from those harmed by the promotion of unlawful activities. This is critical in that Application Note 2 to U.S.S.G. § 3D1.2 provides that, "[f]or offenses in which there are no identifiable victims. . . the 'victim' for purposes of subsections (a) and (b) is the societal interest that is harmed." U.S.S.G. § 3D1.2, Application Note 2. Thus, determining the societal interest that is harmed by a money laundering offense is necessary to determining whether the money laundering has the same victim as the underlying criminal conduct.

In the proceedings below, the Government argued, based on *Napoli*, that the money laundering and transportation of stolen property offenses should not be grouped because the victims of the underlying offenses were the owners of the air bags while the victim of money laundering was society at large. This is indeed the conclusion reached by this Court in

Napoli – but with respect to the concealment prong of the money laundering statute rather than the promotion prong. *See Napoli*, 179 F.3d at 7-8. Because the societal interests harmed by concealment of ill-gotten gains are different from those harmed by promotion of illegal activity, the reasoning of *Napoli* leads to an entirely different conclusion when promotion-type money laundering is considered.

In contrast, none of these interests were implicated by the money laundering at issue in the instant case. Petitioner did not subvert financial institutions or other legitimate enterprises as a means of concealing criminal activity. Nor did his money laundering activity have the effect of making the underlying purchase and transportation of stolen goods more difficult to detect. The money obtained through the sale of the air bags was simply deposited in a bank account, with no attempt made to conceal its origin, and then withdrawn for the purpose of purchasing more air bags. The effect of the money laundering was not to conceal the origin of appellant's funds or to deceive society into thinking them legitimate, but only to enable the stolen air bag enterprise to continue for a longer period. Thus, the only societal interest implicated by this money laundering activity was society's interest in protecting the public from theft – which is precisely the same interest that was breached by the theft itself.

Accordingly, unlike the concealment-type money laundering at issue in *Napoli*, the money laundering activity in this case did not harm any societal interest other than that harmed by the underlying criminal conduct. In fact, even *Napoli* acknowledged that "the function of money laundering can sometimes be so highly interwoven into a fraud scheme that the fraud victim is the direct victim of the money

laundering as well, and the counts should be grouped together." *See Napoli*, 179 F.3d at 8 n.3. This is in fact the very essence of the promotion variety of money laundering – it enables illegal conduct to continue and thus to reach victims who might not have been reached absent the promotion. Accordingly, the victims of appellant's stolen air bag conspiracy were also direct victims of the money laundering activities by which it was promoted.

The reasoning of the majority that grouping would

> have the perverse effect of subjecting to sentence enhancements those who launder the proceeds of their criminal conduct and then cease their unlawful activities, while not enhancing the sentences of those. . . who launder the proceeds of their criminal conduct in order to use the laundered funds to fuel additional criminal activity,

Kalust, 249 F.3d at 109 n.4, is flawed. It is self-evident that the continuation of criminal activity carries a built-in sentencing enhancement in the form of an increased loss guideline. A person who "ceas[es his] unlawful activities" will not cause as great an economic loss as one who conducts "additional criminal activity," and hence will receive a lesser sentence. It is not necessary, as the majority would suggest, to carve out an unwarranted exception to the grouping rules in order to preserve equity in sentencing.

It should also be noted that, despite the cogency of Judge Winter's distinction between concealment and promotion money laundering, his reasoning was likewise flawed. Specifically, in concluding that the individual victims of

petitioner's money laundering activities were not the same as those of his air bag theft, he ignored the fact that petitioner was convicted of an ongoing conspiracy. Rather than being sentenced on the basis of one or two air bag thefts, the offense level for the stolen property counts was based on the *entire* loss caused by his conspiracy over a period of years. Thus, *every* victim of the conspiracy was factored into petitioner's sentence. Since the money laundering counts cover a period beginning after the commencement of the air bag conspiracy and ending simultaneously with it, then every victim of the money laundering was also a victim of the air bag theft. This is not a case like those cited by Judge Winter which involved entirely separate victims; rather, the victims of appellant's money laundering overlap those of the air bag conspiracy. There is simply no way to separate the two; thus, the proper grouping rule is U.S.S.G. § 3D1.2(b) rather than U.S.S.G. § 3D1.2(d).

Finally, the sheer number of cases in which this issue has arisen indicates that it is an "important matter" and thus suitable for this Court's review under Supreme Court Rule 10(a). The issue of whether money laundering counts should be grouped with underlying offenses – and, if so, under what rule – has been visited by no fewer than nine circuits with widely varying results. Moreover, the frequency with which money laundering, especially of the promotion variety, is charged in Federal theft or fraud cases – a frequency which is made clear by even a cursory survey of the case law – indicates that this issue will arise in many future cases. This means that, due to the differing approaches taken by the circuit courts, defendants in similar positions will be sentenced differently depending upon where they committed their crimes – an inequity that strikes at the very purpose of the sentencing guidelines. This is an issue, and a case, that cries out for *certiorari.*

CONCLUSION

In light of the foregoing, this Court should grant the instant petition for *certiorari* and, upon review, reverse the judgment of the Court of Appeals and remand for resentencing at a total offense level of 28.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED, DECIDED AND FILED MAY 3, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: January 9, 2001 Decided: May 3, 2001)

Docket No. 00-1232

UNITED STATES OF AMERICA,

Appellee,

— v. —

EILEEN KALUST, JOSE DIAZ, RADHAMES MELO, aka "Radmes", aka "Raymond", aka "Radhmes", aka "Melo", aka "Ernesto", aka "Rhadames", ELIAS ABREU, aka "Albino", aka "Roberto Abreu", ALL IN ONE AUTO,

Defendants,

MAURIZIO PERCAN,

Defendant-Appellant.

Appendix A

Before:

VAN GRAAFEILAND, WINTER, and CALABRESI,

Circuit Judges.

* * *

Judge Winter concurs in a separate opinion.

* * *

CALABRESI, *Circuit Judge*:

Appellant Maurizio Percan ("Percan") was convicted, after a jury trial, on seventeen counts of criminal activity related to his participation in a conspiracy to steal automobile airbags and resell them to the public. He was subsequently sentenced to 108 months in prison. In this appeal, Percan challenges his sentence on three grounds. First, he contends that, under U.S.S.G. § 3D1.2, the district court should have grouped his convictions related to transportation of stolen property with his convictions for money laundering. Second, he argues that the district court committed an error of law in refusing to grant him a downward departure, under U.S.S.G. § 5K2.0, on the ground that his money laundering conduct was outside the heartland of the money laundering guidelines. Finally, he challenges the district court's application of a four level sentence enhancement under U.S.S.G. § 3B1.1. In this respect, Percan claims that the court's conclusion that he was the leader or organizer of criminal activity involving five or more participants was erroneous.

Appendix A

BACKGROUND

On April 17, 1998, appellant was charged, in a seventeen count indictment, with transportation of stolen goods in interstate commerce in violation of 18 U.S.C. §§ 2314 and 2, money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1957, and 2, and conspiracy to commit these offenses. The evidence adduced at trial, much of it presented through the testimony of cooperating co-conspirators, demonstrated that Percan purchased over one million dollars worth of airbags from defendants Abreu, Acosta, Diaz, and Melo ("the airbag thieves"), who had stolen thousands of airbags from cars parked on the streets of New York and from dealer lots.[1] Through his business, All in One Auto Parts, Inc. ("All in One Auto"), Percan then resold the airbags to customers in all fifty states. The evidence showed that Percan laundered the proceeds of his sales through the bank accounts of All in One Auto and that the money from the airbag sales was used to promote the ongoing conspiracy.[2]

On September 24, 1999, a jury in the United States District Court for the Southern District of New York convicted Percan on all counts. At Percan's sentencing

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1. On occasion, Percan provided the thieves with lists of particular airbags he wanted.

2. The conspiracy was furthered by using the profits from the sale of stolen airbags to pay some of All in One Auto's expenses and to pay the airbag thieves for stealing the goods. Defendant Eileen Kalust, the bookkeeper at All in One Auto, was also charged in the indictment for her role in facilitating the accounting relating to the airbag sales.

hearing, appellant's counsel objected to the Probation Department's recommendation that, for purposes of U.S.S.G. § 3D1.2, the money laundering counts and the counts related to interstate transportation of stolen goods constituted two distinct groups of offenses. Percan objected to the separation of his convictions into different groups because, if approved by the court, this would result in a two point increase in his guidelines level. *See* U.S.S.G. § 3D1.4. Percan argued that, because the transportation of stolen goods and money laundering activities involved "substantially the same harm" and were "so intertwined that they cannot be separated," they should be considered a single group for sentencing purposes. Appellant's counsel also requested a downward departure on the ground that, because Percan's money laundering conduct involved a simple "receipt and deposit" of funds, it was "beyond the heartland of circumstances for which the money laundering guideline was intended." Finally, Percan contended that he did not supervise the airbag thieves, and, therefore, he should not be given a four level guidelines enhancement for being a leader of criminal activity involving five or more participants.

The district court rejected all of Percan's arguments. Judge Schwartz found that, under our decision in *United States v. Napoli*, 179 F.3d 1 (2d Cir. 1999), the victims of Percan's money laundering activities were distinct from the victims of his conduct with respect to transporting stolen goods, and hence, these counts did not involve "substantially the same harm" for purposes of the guidelines. As a result, the court held that grouping Percan's convictions under U.S.S.G. § 3D1.2 was not appropriate. With respect to Percan's request for a downward departure, the court

concluded that "what happened here is within the heartland of the money laundering guidelines." Judge Schwartz explained that "the arguments made [by Percan] . . . in my discretion, and in the law do not [merit] a downward departure." Judge Schwartz also held that an enhancement under § 3B1.1 was appropriate because Percan "was the organizer and the leader of this criminal activity and there is overwhelming evidence to that effect." In reaching this conclusion, he noted that Percan "clearly supervised" the airbag thieves, and he emphasized that at times Percan "told the[ ] airbag thieves . . . what types of airbags he needed."

Percan's offense level was set at thirty, and he was determined to be in criminal history category II. Accordingly, he was sentenced to 108 months in prison.

DISCUSSION

On appeal, Percan reiterates each of the three challenges to his sentence that were presented below.

In *United States v. Napoli*, this court addressed the question of whether counts of fraud and money laundering should be grouped. We acknowledged the existence of a split among the circuits with respect to this question. *See Napoli*, 179 F.3d at 7 (*citing United States v. Wilson*, 98 F.3d 281, 283 (7th Cir. 1996) (permitting grouping); *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995) (same); *United States v. Leonard*, 61 F.3d 1181, 1186 (5th Cir. 1995) (same); *United States v. Hildebrand*, 152 F.3d 756, 763 (8th Cir. 1998) (rejecting a request to group money laundering and fraud counts); *United States v. O'Kane*, 155 F.3d 969, 972-73

(8th Cir. 1998) (same); *United States v. Kunzman*, 54 F.3d 1522, 1531 (10th Cir. 1995) (same); *United States v. Lombardi*, 5 F.3d 568, 570 (1st Cir. 1993) (same)). And we joined the First, Eighth, and Tenth Circuits in denying grouping. *Id.* at 7.

Our holding in *Napoli* was predicated on the requirement in U.S.S.G. § 3D1.2(b) that, for grouping to be appropriate, the counts must "involve the same victim." We concluded that "[t]he 'victims' of fraud counts are those persons who have lost money or property as a direct result of the fraud," while "[t]he 'victim' of money laundering is, by contrast, ordinarily society at large."[3] *Id.* at 7. Appellant presents two arguments to support his claim that *Napoli* does not control this case.

First, he contends that, because *Napoli* involved so-called "concealment" money laundering under 18 U.S.C.

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3. In this respect, we relied on Application Note 2 to U.S.S.G. § 3D1.2, which states that "[t]he term 'victim' is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims . . . the 'victim' for purposes of [the relevant Guidelines] is the societal interest that is harmed." U.S.S.G. § 3D1.2, App. Note 2, *cited in Napoli*, 179 F.3d at 7.

We also explained, in a footnote, that it was not necessary to "decide . . . whether we agree with those circuits that have held that the function of money laundering can sometimes be so highly interwoven into a fraud scheme that the fraud victim is the direct victim of the money laundering as well, and the counts should be grouped together." *Id.* at 8 n.3.

§ 1956(a)(1)(B), whereas his conviction related to "promotion" money laundering under 18 U.S.C. §§ 1956(a)(1)(A)(i), the grouping analyses differ. Specifically, appellant urges that in "concealment" cases, "the act of money laundering is typically separate from the underlying criminal conduct," while "money laundering [that] involves *promotion* of illegal conduct . . . is typically *not* independent of the underlying criminal activity." In the latter class of cases, appellant claims, there is "a single ongoing course of criminal activity" and so grouping is called for.

Percan explains that in "concealment" cases, the money laundering at issue "harms society's interest in discovering and deterring criminal conduct, because by laundering the proceeds of crime, the criminal vests that money with the appearance of legitimacy." Appellant's Br. at 20 (*citing O'Kane*, 155 F.3d at 972). In contrast, Percan argues, in "promotion" cases such as this one, "none of these interests [is] implicated," because the "money laundering activity [does not] have the effect of making the underlying [crime] more difficult to detect." *Id.*

Like the district court, however, we do not agree with appellant that the victims of Percan's conduct in transporting stolen airbags are the same as the victims of his money laundering activity. *Cf. United States v. Green*, 225 F.3d 955, 960 (8th Cir. 2000) ("Reinvestment itself does not make the victim of money laundering the same as the victim of fraud, although it certainly allows the criminal to increase the number of his fraud victims."). Moreover, by depositing the proceeds of the airbag sales in All in One Auto's bank accounts, Percan attempted to give these funds "the

appearance of legitimacy." *Id.* As a result of this appearance, society's interest in "discovering and deterring criminal conduct" was harmed, just as it is in concealment cases.

Significantly, while there is a circuit split with respect to the question of whether, as a general matter, money laundering and fraud counts ought to be grouped for sentencing purposes, *see supra* p. 2929, none of the circuits has, to date, adopted a regime under which promotion money laundering results in grouping, while concealment money laundering does not.[4] And we see no basis for drawing such a distinction.

Our conclusion also finds support in the language of the Introductory Commentary to U.S.S.G. § 3D. There, the Sentencing Commission explains that "[t]he rules in this Part seek to provide incremental punishment for significant additional criminal conduct." In this case, if the district court had grouped all of Percan's convictions, then his offense level would have been 28, just as it would have been had he only engaged in money laundering and not interstate

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4. The question appears to be an open one in the Seventh Circuit. *See United States v. Emerson*, 128 F.3d 557, 564-65 (7th Cir. 1997).

Permitting grouping in promotion, but not in concealment, cases, as defendant requests, would, incidentally, have the perverse effect of subjecting to sentence enhancements those who launder the proceeds of their criminal conduct and then cease their unlawful activities, while not enhancing the sentences of those, like Percan, who launder the proceeds of their criminal conduct in order to use the laundered funds to fuel additional criminal activity.

transportation of stolen goods as well. By separating appellant's offenses into two groups, the district court properly provided for incremental punishment, based on the fact that Percan's violations of 18 U.S.C. §§ 2314 and 2 constituted significant additional criminal conduct above and beyond his money laundering. *See Green*, 225 F.3d at 959.

Second, appellant contends that, even if we decline to draw a categorical distinction between concealment and promotion money laundering, it is still possible, after *Napoli*, to group all of his convictions. In pressing this claim, Percan relies on the footnote in *Napoli* that reserved decision on whether, in some circumstances, money laundering is "so highly interwoven into a fraud scheme that the fraud victim is the direct victim of the money laundering as well." *Napoli*, 179 F.3d at 8 n.3. Appellant claims that his is just such a case and, therefore, that grouping is in order.

We disagree. Percan's money laundering activity and his participation in the stolen airbag conspiracy can only be viewed as more interwoven than the money laundering and fraud at issue in *Napoli* insofar as this case involves promotion, and *Napoli* concealment, money laundering. And, as we have already said, that distinction does not undermine the reasoning of *Napoli*. That is, it does not, on its own, make the victims of the two crimes the same for grouping purposes.

Appellant's other claims can be dealt with summarily. Ordinarily, we lack jurisdiction to review a district court's denial of a downward departure. *See, e.g., United States v. Lawal*, 17 F.3d 560, 562 (2d Cir. 1994). "The only exceptions to this rule are . . . where the defendant shows that a violation

of law occurred, that the Guidelines were misapplied, or that the refusal to depart was based on the sentencing court's mistaken conclusion that it lacked the authority to depart." *United States v. Zapata*, 135 F.3d 844, 846 (2d Cir. 1998) (internal quotation marks omitted) (alteration in original). The district court's conclusion that Percan's money laundering activity fell within the heartland suffers from none of these defects and we, therefore, lack jurisdiction to review it.[5]

Finally, we affirm, for substantially the reasons the district court gave, its decision that a four level sentence enhancement, under U.S.S.G. § 3B1.1, was proper.

* * *

The judgment of the district court is AFFIRMED.

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5. Appellant attempts to rest appellate jurisdiction on the notion that a departure was required in this case because his conduct was outside the heartland *as a matter of law*. He buttresses this claim by pointing to a Justice Department memorandum to Congress indicating that "a modification of the guidelines might be appropriate to address . . . 'receipt and deposit cases.' " Appellant also cites a number of cases deeming "receipt and deposit cases" to fall outside the heartland of the money laundering guideline.

These arguments fail to persuade. First, the fact that the Justice Department manifested a desire to see the guideline changed for "receipt and deposit" cases is a far cry from placing such cases outside the heartland under the existing Guidelines. In addition, and obviously, the fact that some courts have concluded that *certain* "receipt and deposit" cases are outside the heartland, *see, e.g.*, *United States v. Woods*, 159 F.3d 1132, 1133-34 (8th Cir. 1998), does not mean that *all* cases that fit into this category merit similar treatment for sentencing purposes, and do so as a matter of law.

Appendix A

WINTER, *Circuit Judge*, concurring in the result:

I write separately because I view the pertinent issue somewhat differently from my colleagues. However, my analysis does not affect the result. I therefore concur.

a) *Designation of Victim*

First, in my view the victim of so-called promotion money-laundering is not society at large, at least on the present facts. To group counts under Subsection 3D1.2(b), the "counts [must] involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." U.S.S.G. § 3D1.2(b). The following Commentary accompanies the Subsection:

> The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (*e.g.*, drug or immigration offenses, where society at large is the victim), the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related.

Id. § 3D1.2, cmt. n.2. Therefore, society is the victim under the Guidelines only by default when no direct victim can be

identified. *See, e.g., United States v. Hibbler*, 159 F.3d 233, 237 (6th Cir. 1998) ("Only in those instances where there is no identifiable victim should a court deem the primary victim to be society.").

Given these criteria, the caselaw that identifies society as the victim of so-called concealment money-laundering makes sense. Concealment laundering follows a crime and by itself has no identifiable victim. Moreover, unpenalized use of a sophisticated and complex system of financial institutions to disguise and transfer funds derived from criminal activity would provide a general incentive to engage in the whole universe of crimes involving monetary gain. It is therefore fair to say that the victim of concealment money-laundering is society at large.

Promotion money-laundering is rather different. The criminal acts here are the use of financial institutions to process the proceeds of prior crimes, to facilitate future crimes. *See* 18 U.S.C. §§ 1956(a)(1)(A)(i), 1957(a). Indeed, "laundering" is a complete misnomer because the future crimes will occur whether the defendant violates the statute by depositing the proceeds in a bank account or avoids the statute's prohibitions by keeping them under a mattress at home.[1] Far from disguising ill-gotten cash, depositing the

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1. Six of the laundering counts in this case alleged violations of 18 U.S.C. § 1957. Section 1957 does not have a specific requirement that the laundering be of the "promotion" variety. However, since it is clear that all of Percan's laundering activities were designed to promote further crimes, my analysis regarding the designation of the victims of his laundering is the same with respect to all of the laundering counts.

fruits of a crime in a bank account openly controlled by the defendant, as occurred here, leaves an incriminating paper trail for investigators in the first place they would look. One suspects that promotion money-laundering has been made a crime not because it by itself alters the character of the underlying crimes, conceals the proceeds of those crimes (rather, it provides a permanent record of them), or creates incentives to engage in criminal activity generally but because it relieves the government of having to offer extensive proof of underlying crimes. For example, the present indictment contains only two stolen goods counts and fifteen money laundering counts, although Percan's thefts of airbags numbered in the thousands.

Because promotion money-laundering, by definition, results in identifiable, additional crimes, it usually produces identifiable victims, and did so here, namely, the successive victims of Percan's airbag thefts. My colleagues agree that those from whom airbags were stolen — the victims of at least the interstate transportation of stolen goods counts — are discrete individuals. Therefore, because the fruits of earlier thefts were deposited by Percan in his company's bank account and used to finance the theft of more airbags from later victims, the later, identifiable, victims of the airbag thefts also were victims of the promotion laundering. To be sure, societal interests were harmed every time Percan's conspiracy fed upon its past fruits to add more victims. However, where there is harm to both society and identifiable victims, the Guidelines' Commentary expressly states that the proper victim, for sentencing purposes, is the individual.

U.S.S.G. § 3D1.2(b) requires that counts have the same victim if they are to be grouped. My colleagues' position,

that individuals are the victims of the stolen-goods scheme while society is the victim of the promotion money-laundering, renders grouping under Subsection (b) inappropriate. My position — that the victims of Percan's promotion money-laundering are those from whom airbags were stolen rather than society—alters the grouping analysis but leads to the same result.[2] As the present indictment is framed, it is difficult to say that the victims of the two airbag theft counts, those "directly and most seriously affected by the offense," U.S.S.G. § 3D1.2, cmt. n. 2, are the same as the victims of the fifteen laundering counts. With respect to the stolen goods counts, the indictment charges Percan with conspiring to and carrying out a conspiracy to transport stolen goods in interstate commerce from May 1995 until approximately April 1998. Each money laundering count, however, focuses on a narrower timeframe. Nine of the fifteen money laundering counts allege laundering beginning in January 1996; four allege it beginning in February 1996; one alleges it beginning in March 1996; and one alleges it beginning as late as December 1997. Clearly, an individual from whom an airbag is stolen today is not a victim of promotion money-laundering that begins tomorrow. Thus, we cannot say that every victim of the acts alleged in the stolen goods counts, which began in 1995, also is a victim of all of the acts alleged in the laundering counts, some of which began as late as 1997.

Because the victims of the successive airbag thefts were a series of different individuals — rather than, say, a single

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2. The indictment in the present matter makes no attempt at identifying the victims of airbag thefts "promoted" by the money laundering.

airbag manufacturer — grouping under Subsection 3D1.2(b) would be impermissible even if the indictment contained a count for each theft, unless it also contained the corresponding laundering counts. *See id.*, cmt. background ("Counts involving different victims . . . are grouped together only as provided in subsection (c) or (d)."); *see also United States v. Clark*, 178 F.3d 290, 293-94 (5th Cir. 1999) (holding two counts of resisting arrest arising from single incident should not have been grouped under Subsection 3D1.2(a) or (b) because there were two separate victims of defendant's resisting arrest, the two deputy marshals); *United States v. Edmonds*, 103 F.3d 822, 826 (9th Cir. 1996) (refusing to group under Subsection 3D1.2(b) where "more than one victim suffered because of [defendant's] mischief," since defendant's making of false statements to law enforcement officials harmed both those about whom defendant spoke as well as those to whom he lied); *United States v. Gist*, 101 F.3d 32, 34 (5th Cir. 1996) (rejecting grouping under Subsection 3D1.2(b) where defendant disposed of hazardous waste at two different sites, thereby affecting different victims in different neighborhoods); *United States v. Brown*, 14 F.3d 337, 341 (7th Cir. 1994) (holding two counts of kidnapping could not be grouped under Subsection 3D1.2(b) where each count alleged kidnapping of a different victim). Because grouping the stolen goods counts with the money laundering counts was improper, I agree with the result reached by my colleagues.

b) *Grouping the Laundering Counts*

Viewing the victims of Percan's promotion money-laundering as individuals who had airbags stolen from them,

rather than society, has other consequences. In the Presentence Investigation Report, the Probation Office recommended that the two stolen goods counts be grouped under Subsection 3D1.2(d) and that the fifteen money laundering counts be separately grouped under Subsection 3D1.2(b). The seventeen counts were thus consolidated in two groups. The district court accepted this recommendation, and neither Percan nor the government questions the original grouping into two groups. (Percan challenges only the failure to group all counts under Subsection (b).) However, I regard the grouping of the money laundering counts under Subsection (b) as plain error. *See* Fed. R. Crim. P. 52(b).

As noted, Subsection 3D1.2(b) requires that every count have the same victim in order for grouping to occur. For the reasons set out above, the fifteen money laundering counts do not each have the same victim. Nevertheless, these counts could have properly been grouped under Subsection (d), which allows grouping "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." U.S.S.G. § 3D1.2(d). The Subsection also lists certain offenses that are to be grouped under it, and the Guidelines sections covering the types of money laundering alleged in this case, Sections 2S1.1 and 2S1.2, are explicitly listed under (d) as offenses that should be grouped. Under Section 2S1.1, the base offense level may be increased from 23 to as high as 36, depending on the amount of money laundered. Under Section 2S1.2, the base offense level may be increased from 17 to as high as 35,

also depending on the amount laundered. The amount of money involved thus plays an important role in determining the offense level. Moreover, Percan's money laundering scheme was clearly "ongoing or continuous." Because the money laundering counts could therefore have been grouped under Subsection (d),[3] the district court's decision to group them under Subsection (b) was in my view harmless.[4]

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3. A recent decision, *see United States v. Petrillo*, 237 F.3d 119, 125 (2d Cir. 2000), includes dicta stating that "application of subsection (d) to money laundering is prima facie inappropriate." However, that dicta occurred in the context of a discussion of our conclusion in *United States v. Napoli* that counts of money laundering and fraud should not be grouped under (d). *Napoli* held that money laundering and fraud were not offenses of the "same general type," *United States v. Napoli*, 179 F.3d 1, 10 (2d Cir. 1999) (quoting U.S.S.G. § 3D1.2, cmt. n.6), and therefore could not be grouped under (d). In particular, *Napoli* concluded that the offenses were different because the guidelines governing fraud measure the amount of harm primarily based on the monetary loss, whereas the guidelines governing money laundering set a much higher initial base offense level, so that less of the total offense level for laundering is based on the specific amount of money involved. *See id.* at 13 ("Because the guidelines for fraud and money laundering measure different types of harms and measure them in different ways . . . [the] fraud and money laundering counts are not of the 'same general type' and should not be grouped together under subsection (d)."); *see also id.* at 10-12; *cf. United States v. Fitzgerald*, 232 F.3d 315, 319 (2d Cir. 2000) (interpreting *Napoli* and holding that tax evasion, fraud, and conversion counts should be grouped under (d) since all "measure the harm by reference to the amount of monetary loss"). *Napoli* further emphasized Commentary language stating that grouping is appropriate where "the offense guidelines . . . base the offense level primarily on the amount of money or quantity of substance involved," U.S.S.G. ch. 3, pt. D, introductory cmt.;

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see Napoli, 179 F.3d at 10, and concluded that the money laundering guideline does not meet this criterion, *see id.* at 10-11.

However, *Napoli*'s interpretation of Subsection (d) is not relevant to the issue I am raising, namely, whether the multiple money laundering counts themselves should have been grouped under (d). Clearly, multiple counts concerning the same basic offensive conduct are offenses of the "same general type." Moreover, as noted, money laundering is specifically listed as an offense appropriate for grouping under Subsection (d). While being listed under (d) may not be dispositive, *see Napoli*, 179 F.3d at 9 n.4 (holding listing under (d) "insufficient" to establish that counts should be grouped), it certainly has weight. Further, the text of Subsection (d) requires only that the "offense level is determined largely on the basis of the total harm or loss." U.S.S.G. § 3D1.2(d). Under the guidelines covering the kind of laundering alleged here, the base offense level may be increased by more than 50 percent, depending on the amount laundered. *See id.* §§ 2S1.1, 2S1.2; *see, e.g., United States v. O'Kane*, 155 F.3d 969, 974 (8th Cir. 1998) ("[I]t is clear that several separate money laundering counts could properly be grouped together under (d). . . .").

The dicta in *Petrillo* says no more than that it may be "prima facie inappropriate" to group money laundering counts with fraud counts, not that it is presumptively inappropriate to group multiple money laundering counts themselves.

4. It does not appear that the offense level in this case would have changed had the fifteen money laundering counts been grouped under (d) rather than (b). When grouping under (b), courts are instructed to take as the offense level that of the "most serious of the counts comprising the Group." U.S.S.G. § 3D1.3(a). In Percan's case, the first money laundering count (count three of the indictment) alleged the most harm, claiming that the defendants used between

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Accordingly, I concur in the result.

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one and two million dollars in illegal proceeds to further the stolen-goods scheme. The Guidelines section that covers money laundering provides for a base offense level of 23 for promotion money-laundering and for an increase in the offense level depending on the amount laundered. *See id.* § 2S1.1. Under that Section, the base offense level is increased by 5 where the amount laundered is between one and two million dollars. *See id.* § 2S1.1(b)(2). Thus, the Probation Office determined that the money laundering counts, grouped under Subsection 3D1.2(b), had a total offense level of 28.

Had the counts instead been grouped under Subsection 3D1.2(d), "the offense level applicable to a Group is the offense level corresponding to the aggregated quantity." *Id.* § 3D1.3(b). "When the counts involve offenses of the same general type to which different guidelines apply . . . , apply the offense guideline that produces the highest offense level." *Id.* In Percan's case, the total amount allegedly laundered was between one and two million dollars, resulting in the same total offense level of 28 under Section 2S1.1, the "guideline that produces the highest offense level" in this case. Thus, because using the aggregated quantity results in the same total offense level in this case as does using the most serious count, grouping the money laundering counts under Subsection (b), while erroneous, does not affect the outcome.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 3rd day of May, two thousand and one.

BEFORE: Hon. Ellsworth Van Graafeiland,
Hon. Ralph K. Winter,
Hon. Guido Calabresi,
Circuit Judges.

Docket No. 00-1232

UNITED STATES OF AMERICA,

Appellee,

V.

EILEEN KALUST, JOSE DIAZ, RADHAMES MELO, aka "Radmes", aka "Raymond", aka "Radhmes", aka "Melo", aka "Ernesto", aka "Rhadames", ELIAS ABREU, aka "Albino", aka "Roberto Abreu", ALL IN ONE AUTO,

Defendants,

MAURIZIO PERCAN,

Defendants-Appellant

Appendix A

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk
by:

s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 13, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Number: 1:98 Cr. 00392-001(AGS)

UNITED STATES OF AMERICA

v.

MAURIZIO PERCAN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Joseph Tacopina, Esq.
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on Counts 1-17 after a plea of not guilty.

Appendix B

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
18 USC 371	Conspiracy to Transport Stolen Goods	5/4/98	1
18 USC 2314	Interstate Transportation of Stolen Goods	5/4/98	2
18 USC 1956(h)	Money Laundering Conspiracy	5/4/98	3
18 USC 1956(a)(1)(A)(i)	Money Laundering	1/31/98	4-11
18 USC 1957(a)	Money Laundering	10/16/96	12-17

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: 120-68-2505	March 10, 2000 Date of Imposition of Judgment
Defendant's Date of Birth: 10/17/68	
Defendant's USM No.: 86684-022	s/ Allen G. Schwartz Signature of Judicial Officer
Defendant's Residence Address: 229 Stewart Avenue Garden City, New York 11530	ALLEN G. SCHWARTZ U.S. DISTRICT JUDGE Name & Title of Judicial Officer
Defendant's Mailing Address: Same as Above	3/13/00 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total of ONE HUNDRED AND EIGHT (108) MONTHS.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant participate in a substance abuse program while incarcerated.

* * *

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☒ The defendant shall surrender to the United States Marshal for this district:

☒ at 9:00 ☒ a.m. ☐ p.m. on April 24, 2000 as notified by the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

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☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

Appendix B

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation officer with access to any requested financial information.

2. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

3. The defendant will participate in a program approved by the U.S. Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol. The defendant will be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the probation officer, based on ability to pay or availability of third-party payment.

4. The defendant is to report to the nearest probation office within 72 hours of release from custody.

5. The defendant shall be supervised in the district of his residence.

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6. The defendant shall pay restitution in the amount of $21,308.26 (joint and severally liable) to be paid in monthly installments of 10% of gross monthly income over a period of supervision to commence 30 days after release from custody.

The defendant shall make restitution payments from any wages he may earn in prison in accordance with the Bureau of Prisons Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision.

7. The defendant shall notify the U.S. Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 1,650	$ 0	$ 21,308.26 joint/ severally

* * *

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RESTITUTION

* * *

x The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	***Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order of Percentage of Payment**
Ford-The American Road Insurance Company National Claim Center – Fairlane Office Center 4 Parklane Blvd., Suite 460 Dearborn, MI 48126 Attn: Beverly Hansler	12,544.26	12,544.25	1

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

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Philip Mostel 75-26 Bell Blvd. Bayside, N.Y. 11364	200.00	200.00	1
Anthony Jameson 205 W. Line Street Hartford, AL 36344	200.00	200.00	1
Peter Thomson 7220 3rd Avenue Brooklyn, N.Y. 11209	500.00	500.00	1
Wilson M. Morales 1085 Walton Avenue, #25 Bronx, N.Y. 10452	2,941.00	2,941.00	1
Geico Direct 750 Woodbury Road Woodbury, N.Y. 11797	2,823.00	2,823.00	1
Nationwide Insurance 2643 Montgomery Hwy, Ste. 2 Dothan, AL 36303	2,100.00	2,100.00	1
Totals:	$21,308.26	$21,308.26	

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[Sheet 5, Part B]

ADDITIONAL DEFENDANTS HELD JOINT AND SEVERAL

Case Number (Including Defendant Number)	Defendant Name	Joint and Several Amount
98 Cr. 392-003	Jose Diaz	12,544.26
98 Cr. 392-005	Roberto Acosta	12,544.26

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately

* * *

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Restitution in the amount of $21,308.26 (joint and severally liable) shall be paid in monthly installments of 10% of gross

monthly income over a period of supervision to commence 30 days after the release from custody. The defendant shall make restitution payments from any wages he may earn in prison in accordance with the Bureau of Prisons Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision.

* * *

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Stipulation and Order of Forfeiture dated September 28, 1999. The amount of $775,000.00

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

* * *

Appendix B

Guideline Range Determined by the Court:

Total Offense Level: 30

Criminal History Category: 2

Imprisonment Range: 108 to 135 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500 to $ 4,500,000

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 21,308.26

* * *

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the sentence is imposed for the following reasons:

Seriousness of the crimes, deter this defendant and others and to protect the public.

* * * *